

§ 40.385

follow formal rules of evidence or procedure in creating the record of the proceeding.

(b) The Director will consider any information or argument he or she determines to be relevant to the decision on the matter.

(c) You may submit any documentary evidence you want the Director to consider. In addition, if you have arranged an informal meeting with the Director, you may present witnesses and confront any person the initiating official presents as a witness against you.

(d) In cases where there are material factual issues in dispute, the Director or his or her designee may conduct additional fact-finding.

(e) If you have arranged a meeting with the Director, the Director will make a transcribed record of the meeting available to you on your request. You must pay the cost of transcribing and copying the meeting record.

§ 40.385 Who bears the burden of proof in a PIE proceeding?

(a) As the proponent of issuing a PIE, the initiating official bears the burden of proof.

(b) This burden is to demonstrate, by a preponderance of the evidence, that the service agent was in serious noncompliance with the requirements of this part for drug and/or alcohol testing-related services or with the requirements of another DOT agency drug and alcohol testing regulation.

§ 40.387 What matters does the Director decide concerning a proposed PIE?

(a) Following the service agent's response (see § 40.379(b)) or, if no response is received, after 30 days have passed from the date on which the service agent received the NOPE, the Director may take one of the following steps:

(1) In response to a request from the service agent (see § 40.379(b)(1)) or on his or her own motion, the Director may dismiss a PIE proceeding if he or she determines that it does not concern serious noncompliance with this part or DOT agency regulations, consistent with the Department's policy as stated in § 40.365.

49 CFR Subtitle A (10–1–01 Edition)

(i) If the Director dismisses a proposed PIE under this paragraph (a), the action is closed with respect to the noncompliance alleged in the NOPE.

(ii) The Department may initiate a new PIE proceeding against you on the basis of different or subsequent conduct that is in noncompliance with this part or other DOT drug and alcohol testing rules.

(2) If the Director determines that the initiating official's submission does not have complete information needed for a decision, the Director may remand the matter to the initiating official. The initiating official may resubmit the matter to the Director when the needed information is complete. If the basis for the proposed PIE has changed, the initiating official must send an amended NOPE to the service agent.

(b) The Director makes determinations concerning the following matters in any PIE proceeding that he or she decides on the merits:

(1) Any material facts that are in dispute;

(2) Whether the facts support issuing a PIE;

(3) The scope of any PIE that is issued; and

(4) The duration of any PIE that is issued.

§ 40.389 What factors may the Director consider?

This section lists examples of the kind of mitigating and aggravating factors that the Director may consider in determining whether to issue a PIE concerning you, as well as the scope and duration of a PIE. This list is not exhaustive or exclusive. The Director may consider other factors if appropriate in the circumstances of a particular case. The list of examples follows:

(a) The actual or potential harm that results or may result from your noncompliance;

(b) The frequency of incidents and/or duration of the noncompliance;

(c) Whether there is a pattern or prior history of noncompliance;

(d) Whether the noncompliance was pervasive within your organization, including such factors as the following: